

Claimant waitress, who credibly testified that she called the employer to say she was unable to work for two weekends after having all of her teeth extracted, was discharged without evidence of deliberate misconduct or knowing policy violations, since her testimony that she called out was corroborated by a note and invoice from her dentist, and employer failed to appear at remand hearing.

**Board of Review
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BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by P. Sliker, a review examiner of the Department of Unemployment Assistance (DUA), to deny unemployment benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant last worked for the employer on September 10, 2016. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on December 23, 2016. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the employer, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on January 25, 2017. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant voluntarily left employment without good cause attributable to the employer and without urgent, compelling, and necessitous reasons and, thus, was disqualified, under G.L. c. 151A, § 25(e)(1). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we remanded the case to the review examiner to take additional evidence, including evidence regarding whether a constructive deduction should be applied if the claimant's separation from this employer was disqualifying. Only the claimant attended the remand hearing. Thereafter, the review examiner issued his consolidated findings of fact and credibility assessment. Our decision is based upon our review of the entire record.

The issue before the Board is whether the review examiner's conclusion, that the claimant abandoned her job without good cause attributable to the employer and without urgent, compelling, and necessitous reasons, is supported by substantial and credible evidence and is free from error of law, where, after remand, the record indicates the claimant was absent from work because she required major dental surgery and she reported her absences to the employer.

Findings of Fact

The review examiner's consolidated findings of fact and credibility assessment are set forth below in their entirety:

1. The claimant worked as a waitress for the employer, a restaurant. The claimant began work for the employer in March, 2016.
2. Until June, 2016, the claimant worked weekdays and weekends for the employer. On June 26, 2016, she was hired for full-time employment with a staffing agency ([Employer A]). She was assigned to work in loan processing for a bank. She worked full-time, Monday through Friday from 8:30 a.m. to 5 p.m. She earned \$18 per hour.
3. After she began her temporary staffing assignment, the claimant began working at the employer Saturday and Sunday nights only. She began work at 4 pm and left when the restaurant closed. She usually worked approximately 10 hours each week. She earned \$3.75 per hour plus tips.
4. In August, 2016, the claimant learned from contacts at her assignment at the bank that the assignment might soon be ending.
5. The claimant needed dentures but before she got them she needed to have her teeth extracted. She was scheduled to begin the process at her dentist's office on Thursday, September 15, 2016.
6. The claimant told one of her managers at the employer about her plans to have dental work done. She did not tell the manager about the extent of her dental work. She told the manager her dental work would begin on September 15, 2016.
7. The claimant last worked for the employer on Saturday, September 10, 2016.
8. The claimant did not work her shift on Sunday, September 11, 2016. She covered her shift by asking a coworker to work for her.
9. On Tuesday, September 13, 2016, the claimant's full-time assignment with the staffing agency ended when the bank decided to phase out the department.
10. On Thursday, September 15, 2016, the claimant had all of her bottom teeth extracted. Her dentist gave her a note excusing her from work from Friday, September 16, 2016, to Sunday September 18, 2016.
11. The claimant's understanding of the employer's expectation regarding unscheduled absences was that she was supposed to call the restaurant and inform of supervisor or manager.

12. On Saturday, September 17, 2016, the claimant called the employer prior to her shift and spoke with a supervisor named [B]. She told the supervisor she was not going to be at work on Saturday or Sunday. She said she had a note from her dentist. She told the supervisor she would call when she was ready to return to work. The supervisor told the claimant she would let the managers know.
13. On Friday, September 23, 2016, the claimant had all of her top teeth extracted. Her dentist gave her a note excusing her from work from Saturday, September 24, 2016 and Sunday September 25, 2016.
14. On Saturday, September 24, 2016, the claimant called the employer and spoke with a hostess. She asked for a manager. The hostess told her there were no managers available. The claimant told the hostess about her surgery and said she would not be at work. The hostess told the claimant the managers knew what was going on.
15. On Sunday, September 25, 2016 the claimant called out of work. It is not known [whom] she spoke with.
16. During the week beginning September 25, 2016, the claimant visited her dentist to have her dentures fitted. She had to return several times for adjustments.
17. At the end of September, the employer replaced the claimant with another waitress.
18. On Saturday, October 1, 2016, the claimant visited her dentist and was cleared to return to work. Her dentist gave her a letter for the employer.
19. At 10 a.m., the claimant called the employer from her dentist's office and spoke with the president. She told him she was ready to go back on the schedule. The president told her that her that she was a no-call no-show and her shifts were gone. She told him about her dental surgery and said she was not a no-call no-show. She told him she had notes from her dentist. She asked if she could pick-up shifts. The president told the claimant he would have to check with his son, who was the restaurant manager. He suggested she also check with his son.
20. Sunday, October 2, 2016, the claimant called the restaurant manager. She told him that his father told her she should call him. She told him about her dental surgery. The restaurant manager told the claimant he had not known about it. The claimant told him she was now available to work Monday through Friday. The restaurant manager told her to call back.
21. On October 4, 2016, the claimant called the employer and spoke with the president. He told the claimant there was no work available.

22. During the week beginning October 9, 2016, the claimant went to the employer and spoke with the president's daughter, the business manager. She gave her the three notes from her physician. She asked if there was anything she could do about returning to work. The business manager told her there was not.
23. The claimant applied for unemployment benefits on October 24, 2016. She was determined to have a benefit year beginning Sunday, October 23, 2016.
24. The claimant earned no wages during the fourth quarter of 2015. The claimant earned \$480.00 in wages during the first quarter of 2016. The claimant earned \$3,410.82 in wages during the second quarter of 2016. The claimant earned \$9,465.63 during the third quarter of 2016.
25. The claimant worked for the employer for 10 weeks in the last quarter (3rd quarter 2016) of her base period. She did not work for the employer in her benefit year.

Note: The record was left open to allow the claimant to provide copies of telephone records. She did not do so.

Credibility Assessment: The employer witness at the hearing was the employer president. He attended the initial hearing [sic] however the employer did not attend the remand hearing. His first hand testimony with regard [to] the claimant was limited [to] only one conversation, when he told her she was discharged. He relied on hearsay statements from other managers and employees for most of his testimony. The employer also did not avail themselves [sic] of the opportunity to provide telephone records. At the remand hearing, the claimant's testimony regarding her calling out each weekend was direct testimony. Her testimony regarding the date she called from her dentist's office was also supported by a letter from her dentist, which is in the record (Remand Exhibit 6, p. 5). Despite some inconsistencies, and her failure to provide telephone records, because the claimant's testimony was direct, and was supported by the note from her dentist, it is more credible than the president's.

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the consolidated findings are supported by substantial and credible evidence; and (2) whether the review examiner's ultimate conclusion is free from error of law. Upon such review, the Board adopts the review examiner's consolidated findings of fact and deems them to be supported by substantial and credible evidence.

The review examiner initially denied benefits after analyzing the claimant's separation under provisions of G.L. c. 151A, § 25(e), which provide, in pertinent part, as follows:

[No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter] . . . (e) For the period of unemployment next ensuing . . . after the individual has left work (1) voluntarily unless the employee establishes by substantial and credible evidence that he had good cause for leaving attributable to the employing unit or its agent . . . [or] if such individual established to the satisfaction of the commissioner that his reasons for leaving were of such an urgent, compelling and necessitous nature as to make his separation involuntary.

Under G.L. c. 151A, §§ 25(e) and 25(e)(1), it is the claimant's burden to establish that she separated for good cause attributable to the employer, or for urgent, compelling, and necessitous reasons. Based on the employer's unrefuted testimony at the first hearing, the review examiner initially found that the claimant became separated after failing to report to work or call the employer after her shift on September 10, 2016, until she contacted the employer again on October 26, 2016, when the employer informed her that she had been replaced. The review examiner concluded that the claimant abandoned her job without good cause attributable to the employer and without urgent, compelling, and necessitous reasons.

We remanded the case because it appeared that the claimant's work for this employer was subsidiary to work she performed for another employer in her base period and, if so, to determine whether the claimant should be subjected to a constructive deduction based on her separation from the instant employer.

After remand, we believe the claimant's separation is more properly analyzed under G.L. c. 151A, § 25(e)(2), which provides, in pertinent part, as follows:

[No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter for] . . . the period of unemployment next ensuing . . . after the individual has left work . . . (2) by discharge shown to the satisfaction of the commissioner by substantial and credible evidence to be attributable to deliberate misconduct in wilful disregard of the employing unit's interest, or to a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, provided that such violation is not shown to be as a result of the employee's incompetence

Under G.L. c. 151A, § 25(e)(2), it is the employer's burden to establish that the claimant was discharged for a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, or for deliberate misconduct in wilful disregard of the employer's interest. We conclude that the employer has not met its burden.

After remand, the review examiner found that the claimant had reduced her schedule with the instant employer to weekends in approximately June 2016, because she had secured full-time employment with a client of a temporary staffing service Mondays through Fridays. The review examiner also found that the claimant required major dental work, including extraction of all her teeth so she could get dentures. The claimant told a manager at the instant employer that her dental work would begin on September 15, 2016.

The claimant's employment with the temporary staffing service ended on September 13, 2016, due to the client company phasing out the claimant's department. The claimant had all of her bottom teeth extracted on September 15, 2016, and obtained a note from her dentist excusing her from work from September 16 through 18, 2016. The claimant called the employer before the start of her shift on September 17, 2016, and told a supervisor that she would be out both Saturday and Sunday that weekend, and that she had a note from her dentist. The supervisor told the claimant she would inform the managers.

The claimant had all of her top teeth extracted on Friday, September 23, 2016. Her dentist gave her a note excusing her from work from Saturday and Sunday, September 24 and 25, 2016. The claimant called the employer on September 24 and asked the hostess for a manager. Since there was no manager available, the claimant told the hostess about her surgery and said that she would not be at work. The hostess told the claimant the managers knew what was going on. The claimant called out again on September 25, 2016, but did not recall with whom she spoke.

During the week of September 25, the claimant visited her dentist several times for adjustments to her dentures. By the end of September, the employer had replaced the claimant with another waitress.

On October 1, 2016, the claimant visited her dentist, who cleared her to return to work and gave her a letter for the employer. The claimant called the employer at 10:00 a.m. and told the president she was ready to return to work. The president told her that she had been a "no-call/no-show," and that her shifts were gone. The claimant complained that she had notes from her dentist, argued that she had not been a no-call/no-show, and asked if there were any shifts that she could pick up. The president told her that he would have to check with his son, the restaurant manager, and suggested that the claimant do the same. The claimant spoke with the restaurant manager, the president again, and the business manager at different times thereafter. She gave the employer the notes from her doctor but was not allowed to return to work. The claimant filed for unemployment benefits on October 24, 2016.

The facts found by the review examiner after remand support the conclusion that the employer replaced the claimant while she was recovering from dental surgery. Reversing his initial findings and conclusion that the claimant had quit by abandoning her job without calling to report her absences, the review examiner made a credibility assessment that the claimant had remained in contact with the employer while she was undergoing major dental work, calling out each weekend when she was unable to work. The review examiner's credibility assessment was bolstered by a written statement from the claimant's dentist, as well as an invoice for the claimant's dental procedures from the dentist's office. *See* Remand Exhibit # 6, pp. 4–5. Such assessments are within the scope of the fact finder's role, and, unless they are unreasonable in relation to the evidence presented, they will not be disturbed on appeal. *See School Committee of Brockton v. Massachusetts Commission Against Discrimination*, 423 Mass. 7, 15 (1996).

In view of the employer's argument that the claimant became separated due to job abandonment, and the review examiner's rejection of the employer's testimony, the employer is precluded from also arguing that the claimant was discharged for disqualifying misconduct.

We, therefore, conclude as a matter of law that the claimant was discharged, without evidence of deliberate misconduct in wilful disregard of the employer's interest, or of a knowing violation of a reasonable and uniformly enforced policy or rule of the employer, pursuant to G.L. c. 151A, § 25(e)(2).

Because we conclude that the claimant's separation from this employer was non-disqualifying, there is no need to address the question of a constructive deduction.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending September 11, 2016, and for subsequent weeks, if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - June 26, 2017



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

Member Judith M. Neumann, Esq. did not participate in this decision.

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT
COURT OR TO THE BOSTON MUNICIPAL COURT
(See Section 42, Chapter 151A, General Laws Enclosed)**

The last day to appeal this decision to a Massachusetts District Court is thirty days from the mail date on the first page of this decision. If that thirtieth day falls on a Saturday, Sunday, or legal holiday, the last day to appeal this decision is the business day next following the thirtieth day.

To locate the nearest Massachusetts District Court, see:
www.mass.gov/courts/court-info/courthouses

Please be advised that fees for services rendered by an attorney or agent to a claimant in connection with an appeal to the Board of Review are not payable unless submitted to the Board of Review for approval, under G.L. c. 151A, § 37.

JPC/rh